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Opinion following order vacating prior opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CHARLES A. KOCH III, Plaintiff and Appellant, v. CHEMSPEED, INC., Defendant and Respondent.	A126332 (Napa County Super. Ct. No. 26-45081)

Appellant Charles A. Koch III sued respondent Chemspeed, Inc. for breach of contract and other causes, but the litigation came to a halt with the granting of respondent's motion to quash service of summons, based on a forum selection clause in a settlement agreement among the parties and Chemspeed, Inc.'s parent entity. Koch claims the settlement agreement does not cover his dispute. We conclude that the scope of the settlement agreement, and whether it embraces Koch's claims, is for the selected forum to decide. However, because technically Chemspeed, Inc. should have moved to dismiss or stay based on inconvenient forum, rather than to quash summons, we remand to the trial court to enter a proper order and in all other respects affirm.

I. BACKGROUND

A. *The Chemspeed Entities*

Chemspeed, Inc. manufactures analytical chemistry synthesis equipment. The company is incorporated and headquartered in New Jersey and at the pertinent times was authorized to transact business in California. Chemspeed Ltd., now defunct, was the parent company of Chemspeed, Inc.; it was incorporated in Augst, Canton of Basel-

Country, Switzerland. Chemspeed Ltd. experienced financial difficulties in late 2004, filed for bankruptcy/dissolution under Swiss law and was dissolved by court order in August 2006.

B. *Employment Relationship*

On May 10, 2000, Koch and Chemspeed, Inc. entered a written employment contract (Employment Agreement), pursuant to which Koch agreed to serve as Chemspeed's West Coast sales area manager for an annual base salary of $68,040 plus commission. The contract included a forum selection clause, entitled "Court of Justice," as follows: "The present agreement is governed by and construed under US LAW. The sole place of jurisdiction for disputes arising out of, or relating to this agreement is **Princeton, N.J**." Koch was promoted to business manager in 2001 and he received a salary increase, pursuant to an amendment to the contract that listed Chemspeed, Inc. as " 'The Company' " and Koch as " 'The Employee,' " but the signature line listed Chemspeed Ltd. as " 'The Company.' " In May 2002 Koch enjoyed another promotion, to general manager for the Americas, with an annual base salary of $75,000 plus commission. In this latter capacity, Koch carried on all United States operations for the company. He authorized pay warrants and commission checks, and approved expense claims for all United States employees of Chemspeed, Inc.; hired and fired all United States employees of Chemspeed, Inc. and issued orders and directives to them.

In January 2001 Koch entered into an option plan agreement with the parent company, Chemspeed Ltd., pursuant to which Koch chose to use his commission to buy options to acquire shares. The agreement recited that the "[e]mployee has to agree to the Rule of the option plan to obtain options." If the employee did not agree, "the employee can request the value according to the offer in cash." The "Rule" referred to a Chemspeed Ltd.'s "Reglement," translated as: " 'Regulation: Employee Participation Chemspeed Ltd. Augst' " (the Regulation). Pursuant to the Regulation, Chemspeed Ltd. was the issuing corporation. The Regulation provided that employees can choose to "purchase employee shares in quantities according to their bonus." If the employee did

not notify management of the desire to purchase shares by a certain date, he or she would receive disbursement of a cash bonus instead.

In January 2002 Koch deposited his 2001 commissions in the amount of $20,000 into the Chemspeed Ltd. option program.

Beginning January 1, 2003, Koch's salary was reduced by $5,000. Koch demanded return of the $20,000 he invested in the option program. In May 2003, "Chemspeed fired" Koch.[1] Koch sent numerous communications to "Chemspeed" demanding payment for back wages, bonuses, expenses and "stock option monies."

Koch entered into a settlement agreement with Chemspeed, Inc. and Chemspeed Ltd. on July 4, 2003 (Settlement Agreement). This agreement indicated that the parties reached "a final settlement." Like the Employment Agreement, it provided: "The present agreement is governed by and construed under US LAW. The sole place of juristication [*sic*] for disputes out of, or relating to this agreement is Princeton, NJ."

Under the Settlement Agreement, the Chemspeed entities agreed to pay Koch "23,109.46$ (according [to] the employment agreement) (see attachment)." The attachment, immediately following the signature lines, listed all items to be returned by Koch, and detailed the components of the settlement: salary owed, offset by certain overpayments; expenses due to Koch; plus a "[f]urther payment." Following the "Total payable" line, the attachment concluded with this statement: "Name owns 183 shares from Chemspeed. Chemspeed is not forced to take the shares back according to the option plan. The shares will be transferred according [to] signed documents." Koch understood this statement to mean that "[d]efendants refused" to pay him the commission he invested in Chemspeed Ltd. stock. Chemspeed, Inc. paid $23,109.46 to Koch in July 2003.

[1] In his declaration Koch referred to Chemspeed, Inc., Chemspeed Ltd. and "Chemspeed." He claimed that he knew of no distinction between the two, and gave as an example the amendment to the Employment Agreement referenced above. However, Koch acknowledged that he signed the Employment Agreement with Chemspeed, Inc., and that at all times his paychecks were issued by Chemspeed, Inc.

Then on July 10, 2003, Koch received an unexecuted document titled "employee shares 2001," identifying the company as Chemspeed Ltd. and the employee as Koch, and confirming that in accordance with the option plan, he received rights for 183 employee shares. The document referred the participant to the Regulation as governing the "handling" of the shares. Further, it indicated that the rights to the shares were assigned to Koch on April 30, 2002, and were available for three years after assignment or after an initial public offering. On July 14, 2003, Chemspeed Ltd. faxed Koch a German language copy of the Regulation which he had translated.

Koch renewed his demands for return of the commission money in 2006. In November 2008 Koch filed suit against Chemspeed, Inc. and various officers of Chemspeed, Inc. for breach of contract, fraud, tortious breach of contract, conversion, unjust enrichment, and intentional and negligent infliction of emotional distress. Although named as defendants, apparently the officers were never served. The gist of the complaint was that Koch was pressured into investing in the option program, and was assured that his commission money would be available to him, after a period of time, plus 5 percent interest, "if CHEMSPEED did not go public." Koch demanded the return of $20,000 in commission plus interest, but "[d]efendants" have "failed and refused to repay" him. As well, "[d]efendants" deceived Koch by withholding pertinent information and providing information in German, and made false statements and promises to him.

The trial court granted Chemspeed, Inc.'s motion to quash service of summons. It concluded that the forum selection clause designated Princeton, New Jersey as the sole jurisdiction for adjudication of disputes arising out of or relating to the Settlement Agreement, and requiring that disputes be litigated in New Jersey was not unreasonable because that is where Chemspeed was incorporated. This appeal followed.

II. DISCUSSION

A. *Clarification Regarding Chemspeed, Inc.'s Motion*

Chemspeed, Inc. brought its motion under Code of Civil Procedure section 418.10, subdivision (a), which permits a defendant to "file a notice of motion for one or more of

the following purposes: [¶] (1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her. [¶] (2) To stay or dismiss the action on the ground of inconvenient forum." The subdivision (a)(2) motion to dismiss or stay for inconvenient forum *is not* a challenge to jurisdiction, but rather a request that jurisdiction be declined. (See 2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, § 227, p. 834.) That is to say, while parties cannot deprive courts of jurisdiction over a cause by private agreement, courts have "discretion to decline to exercise jurisdiction in recognition of the parties' free and voluntary choice of a different forum." (*Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 495, italics omitted (*Smith*).) Chemspeed, Inc. specifically alluded to the stay or dismiss language of subdivision (a)(2), but titled the motion a motion to quash service and so referred to the motion in its moving papers. Here, the proper motion is a motion to stay or dismiss because of inconvenient forum. This is the procedure for enforcing a forum selection clause, which is what Chemspeed, Inc. has sought to do. (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1294.) Accordingly, we will remand to the trial court to enter a proper order under Code of Civil Procedure section 418.10, subdivision (a)(2).

B. *Standard of Review*

There is a split of authority concerning the correct standard of review on a motion to enforce a forum selection clause. (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 7-9 (*America Online*); see *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 198-199 (*Intershop*).) Our Division Two in *America Online* persuasively explained why the abuse of discretion standard is proper in this situation, and hence we join them in adhering to that standard. (*America Online, supra*, 90 Cal.App.4th at pp. 8-9.) The *America Online* court emphasized that in *Smith*, our Supreme Court denied a request for mandamus, concluding that the lower court " 'acted within its discretion' " in honoring a contractual forum selection clause. This statement signaled that review of the lower court's decision should proceed under the deferential abuse of discretion standard. (*America Online, supra*, at p. 7.)

C. *The Forum Selection Clause is Valid and Enforceable*

California law presumes that a contractual forum selection clause is valid, and assigns the burden of proof to the plaintiff resisting enforcement to show that enforcement would be unreasonable under the circumstances of the case. (*Smith*, *supra*, 17 Cal.3d at pp. 496-497; *Schlessinger v. Holland America* (2004) 120 Cal.App.4th 552, 558; *Intershop*, *supra*, 104 Cal.App.4th at p. 198.) Enforcement of a forum selection clause is not unreasonable by virtue of the fact that it is contained within a contract bearing basic qualities of an adhesion contract—"a standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms." (*Intershop*, *supra*, 104 Cal.App.4th at p. 201.) After all, an adhesion contract nonetheless is a valid contract. (*Ibid.*) Additionally, the mere inconvenience or expense of litigating in the chosen forum is not the test of unreasonableness. (*Smith*, *supra*, 17 Cal.3d at p. 496.) Instead, the plaintiff's burden is to demonstrate that the selected forum would be unavailable or unable to accomplish substantial justice; no rational basis supports the choice; or enforcement of the forum selection clause would be against public policy. (*CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1354.)

In *Intershop*, the plaintiff brought suit in California against his former employer—a United States subsidiary of a German corporation—and the parent company, for breach of a stock options exchange agreement. The agreement contained a choice of law and forum selection clause, designating Hamburg, Germany as the site of jurisdiction. Upholding the forum selection clause on appeal, the reviewing court concluded as a matter of law that no public policy of California was violated by enforcing it, and the plaintiff made no showing that substantial justice could not be achieved in a German court or that a rational basis was lacking for selection of Hamburg as the forum. (*Intershop*, *supra*, 104 Cal.App.4th at pp. 200-201.) Indeed the court noted that enforcement of the clause made sense under the circumstances, where the options were for stock in a German corporation subject to German securities regulations, and the parties agreed that German law would apply. (*Id.* at p. 200.)

Here, the same forum selection clause was included in the written, signed Settlement Agreement and the Employment Agreement. A party seeking to defeat such a clause bears the heavy burden of showing that its enforcement would be unreasonable under the circumstances. The choice of Princeton, New Jersey as the exclusive forum to litigate disputes encompassed within those agreements is reasonable under the circumstances of the case. Chemspeed, Inc. is a New Jersey corporation and maintains its lead office there. Koch has made no showing, and does not argue, that New Jersey courts are unavailable or incapable of accomplishing substantial justice; that a rational basis is lacking for the selection of Princeton, New Jersey as the forum; or that enforcement of the forum selection clause would run afoul of some California public policy. In short, there is no basis for denying enforcement of the forum selection clause.

D. *The Selected Forum Should Decide the Matters In Dispute*

While Koch does not dispute that the forum selection clause is valid and enforceable, he is adamant that his grievance is not subsumed within the terms of the Settlement Agreement and its forum selection clause. He harnesses his appeal to the theory that there are two separate documents involved here, not one: the Settlement Agreement comprised of four "whereas" clauses and six numbered paragraphs followed by the parties' signatures; and a separate, unmarked, unsigned one-page document, which was transmitted to him with the Settlement Agreement. It is the purported separate document that references the issue of his ownership of 183 shares and indicates that they need not be redeemed. On the other hand, Koch asserts the forum selection clause is a negotiated term of the three-page Settlement Agreement, which "does not apply to the stock option/shares issue."

For the record we note that Koch concedes he received a four-page transmission. That transmission consisted of the following: The first page is titled "Settlement Agreement," identifies the parties and contains the "whereas" clauses. Each of pages two through four is consecutively numbered, centered at the top of the page. The parties' signatures appear on page three, while pages one, two and four are each initialed by one of the corporate officers.

The "whereas" clauses on page one delineate the nature of the agreement, specifying, among other points, that (1) Koch has an employment agreement with Chemspeed, Inc. and Chemspeed Ltd., respectively; (2) "Chemspeed" terminated the employment agreement on May 16, 2003; and (3) the parties have reached a final settlement. Page two and continuing to page three contain six numbered paragraphs comprising the legal terms of the agreement. Paragraph two states: "Chemspeed pays 23109.46$ (according [to] the employment agreement) (see attachment) and assuming no violation against this final settlement agreement occurs. . . ." The attachment referenced in paragraph two begins on page three, following the signatures, and continues on page four. It is labeled "**Attachment**." The page three contents of the attachment itemizes the property which Koch must return. The page four contents of the attachment itemizes the components of the net settlement sum referred to in paragraph two, and confirms the number and status of Koch's 183 shares, namely, they need not be redeemed for cash.

Koch himself acknowledged in the complaint that he accepted the settlement offer transmitted from the Chemspeed entities *notwithstanding their refusal to pay him the commission money* as reflected in the statements confirming the number and status of his shares, because he feared they would not pay "anything owed to him." Clearly, Koch understood from the Settlement Agreement that the final settlement *omitted* repayment of the cash commissions which he had invested in Chemspeed Ltd. stock. This understanding came from the attachment which informed paragraph two of the Settlement Agreement and the scope of the final settlement. Thus Koch's continual pronouncements on appeal that page four is a separate "one page document" not encompassed within the Settlement Agreement is inconsistent with his pleading.

We note, too, that without regard to whether page four is part of the Settlement Agreement, this litigation in essence involves a claim against Chemspeed, Inc., his former employer, for repayment of his commission money which he elected to invest in Chemspeed Ltd., now defunct, pursuant to the option plan agreement. That agreement was between Koch and Chemspeed Ltd., *which is not a party to this lawsuit*. As against Chemspeed, Inc., Koch's claim for repayment of the commissions arises out of or is

related to Settlement Agreement and/or the Employment Agreement, both of which contain the same forum selection clause electing Princeton, New Jersey as the forum for resolution of such disputes.

Finally we underscore that properly understood, Koch's argument rests on matters of contract construction. The very issue as to whether the attachment, and specifically page four thereof, is an integral part of the Settlement Agreement requires construction of the Settlement Agreement. Without question this matter comprises a dispute "out of, or relating to," the Settlement Agreement. Therefore, under the unambiguous language of the forum selection clause, that dispute must be adjudicated, if at all, in a Princeton, New Jersey forum according to its choice of law and contract interpretation rules.

III. DISPOSITION

We remand the cause to the trial court to enter an appropriate order dismissing or staying the matter pursuant to Code of Civil Procedure section 418.10, subdivision (a)(2), and in all other respects affirm the order. The parties will bear their own costs on appeal.

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Reardon, J.

We concur:

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Ruvolo, P.J.

_____
Sepulveda, J.